

of May 6, 2008, which was affirmed by a Board Member in a July 31, 2008, Order. Respondent now contends that claimant's ongoing medical treatment is necessitated by conditions not related to the original exposure in December 2007 and the subsequent medical treatment. Claimant contends that her health problems began with the dust exposure in December 2007 and that health problems were compounded by the Prednisone treatments administered by the then authorized treating physicians. Therefore, the Preliminary Decision should be affirmed.

2. Is claimant entitled to ongoing medical treatment? Does the Board have jurisdiction over this issue on appeal from a preliminary hearing decision?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Preliminary Decision should be affirmed.

Claimant worked as a legal secretary from May 2004 through December 2007. At that time, respondent was redoing certain rooms in their Johnson County offices. This caused claimant to be exposed to drywall dust. On December 10, 2007, claimant began to experience headaches and discomfort while breathing. Claimant advised her supervisor, Julie Hurl, of the problem and left early from work that day. The next day (December 11, 2007), claimant was examined by her physician, Randall Madison, M.D., and was diagnosed with reactive airway disease which was being aggravated by the dust at work. Claimant was given a mask and a refill of Albuterol, which she used due to preexisting sports-induced asthma. Claimant continued working and her symptoms continued.

Claimant was examined by one of her primary care physicians, board certified family medicine specialist Gregory Lee Curry, M.D., of Dr. Madison's office, on December 12, 2007. Claimant had been a patient of Dr. Curry for several years. In fact, claimant was treated by Dr. Curry on November 20, 2007, for upper respiratory complaints and was diagnosed with sinusitis and placed on Augmentin (an antibiotic) and Robitussin AC. Claimant remained on the Augmentin for 10 days.

At the December 12, 2007, examination, claimant was given a short burst of Prednisone, a steroid, to help alleviate the breathing problems. Claimant remained on the Prednisone for several days. On December 18 or 19, she was transferred to respondent's downtown office. On December 21, Dr. Curry again gave claimant Prednisone, only a higher dose. When claimant was examined on December 11, 2007, it was with Dr. Madison. Claimant's spirometry test, which tests lung volume, was normal on that date.

On December 28, 2007, claimant contacted Dr. Curry complaining of feeling flushed. On January 2, 2008, she was also experiencing anger, rage and panic attacks. She was advised to discontinue the Prednisone immediately. The next day, January 3, 2008, those symptoms were gone, but on January 4, 2008, claimant began to have swelling in her face, neck, shoulders and chest. She also experienced pain in her bones and, on January 7, 2008, her skin was very sensitive to touch.

Claimant then began to undergo a series of tests for a multitude of possible conditions. Tests for mononucleosis, leukemia, a viral syndrome, hepatitis B, lupus, AIDS, rheumatoid arthritis, Epstein-Barr virus, parvovirus and toxoplasmosis were all negative. An EMG indicated that claimant had peripheral neuropathy in her lower calves. Claimant complained of being in pain 24 hours a day, was experiencing difficulty eating and had tremors and shakes.

The matter went to preliminary hearing on May 1, 2008, with claimant requesting both TTD and ongoing medical treatment. Robert H. Foerschler, the ALJ on the case at that time, ordered TTD and ongoing medical treatment with the medical providers claimant had been, to that point, using. A specific authorized health care provider was not identified. The matter was appealed to the Board, and a Board Member affirmed the award of TTD but modified the Preliminary Decision to designate Dr. Curry as the authorized treating physician. Claimant has remained on TTD and has been receiving ongoing authorized medical treatment since that time.

Respondent filed an Application For Preliminary Hearing, Form K-WC E-3, requesting that the TTD be stopped and claimant's authorized medical treatment also be discontinued. After the January 6, 2011, preliminary hearing, the ALJ stopped claimant's TTD but allowed ongoing medical treatment as recommended by rehabilitation specialist Steven L. Hendler, M.D. In his report of August 16, 2010, Dr. Hendler noted that claimant had undergone extensive medical evaluations and treatment, including over one year of physical therapy. Laboratory tests indicated adrenal insufficiency, but MRI studies failed to uncover any problems. As the result of his examination, Dr. Hendler diagnosed claimant with somatic dysfunction, migraine headaches, sinusitis, depression, anxiety, opioid dependence and intermittent leukocytosis, a disease indicating a variation in the number of white blood cells. Dr. Hendler stated that, while it is possible that claimant has "some as yet identified [*sic*] medical condition," none has been identified to date and the records do not support the presence of such a condition.¹ He stated that claimant's symptoms are not related to the exposure while claimant was working for respondent. Claimant is not currently in need of any additional medical treatment connected to the exposure at respondent's office and claimant is currently capable of returning to work without restrictions. Dr. Hendler did express concern that claimant had not worked

¹ P.H. Trans. (Jan. 6, 2011), Resp. Ex. C at 4 (Dr. Hendler's report).

for over 2.5 years and could be somewhat deconditioned. A gradual return to work was recommended.

In a report dated January 3, 2011, board certified neurologist Laura G. Reilly, M.D., discussed the ongoing attempts to slowly wean claimant off of her pain medication. Dr. Reilly did not recommend a return to work until this pain medication reduction was successfully completed. While Dr. Reilly found a connection between claimant's mild degree of spasticity with some soft neurological findings and the job-related asthma attack, she suspected that a transient eosinophilia infection may have been responsible for the mild central nervous system damage, which she identified as being stable at that time.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.²

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.³

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁴

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

² K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁴ K.S.A. 2007 Supp. 44-501(a).

injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”⁵

K.S.A. 44-508(d) defines “accident” as,

... an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.⁶

Injury or personal injury has been defined to mean,

... any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker’s usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.⁷

It is not disputed that claimant suffered an exposure at work in December 2007 which had an adverse effect on her health. Additionally, one of the treatments administered for the breathing difficulties from that exposure was the Prednisone. The sudden cessation of the Prednisone then caused claimant to experience a myriad of symptoms resulting in extensive testing and treatment. Unfortunately, this also led to the use of significant opioid pain medication. It is the treatment of this opioid dependence and the gradual weaning from this medication that concerns some of claimant’s doctors at this time.

The ALJ recognized that a sudden cessation of opioids could lead to further health problems for claimant. Additionally, a forced return to full-time employment after so long a period could lead to added difficulties. While the Preliminary Decision is not clear on some points, the result is that claimant is no longer temporarily totally disabled and the TTD has been stopped. Claimant has been ordered to return to work gradually, and the medical care continues.

This Board Member finds that the need for the current treatment stems from the original accident and exposure at work, leading to medications which caused

⁵ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁶ K.S.A. 2007 Supp. 44-508(d).

⁷ K.S.A. 2007 Supp. 44-508(e).

claimant added problems and the possible overuse of the opioids. The need for the gradual weaning of claimant from those medications is the result of that overuse. Therefore, the need to wean claimant from those medications stems from an accident which arose out of and in the course of claimant's employment.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?⁸

Normally, the Board does not take jurisdiction of medical questions on appeal from a preliminary decision. However, when, as here, the issue is whether the medical treatment stems from a work-related versus a non-work-related condition, the question becomes one of whether a claimant suffered an accidental injury which arose out of and in the course of his or her employment. That question is one which allows Board jurisdiction.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant suffered personal injury by accident which arose out of and in the course of her employment with respondent. The current need for ongoing medical treatment stems from that accident. The Preliminary Decision of the ALJ is affirmed.

⁸ K.S.A. 44-534a(a)(2).

⁹ K.S.A. 44-534a.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Decision of Administrative Law Judge Marcia L. Yates Roberts dated January 13, 2011, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April, 2011.

HONORABLE GARY M. KORTE

c: Timothy E. Power, Attorney for Claimant
Jeff S. Bloskey, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge